mate decision must be postponed until the end of the trial after the defence has given evidence and close its case. In substance, this is what Gordon Smith Ag. J.A. meant when he held in 1940 in *Public Prosecutor* v. *Chin Yoke* (*ante*) at page 38:

". . . . . that the Magistrate or Judge must necessarily accept the whole of the evidence for the prosecution at its face value. There may be good grounds for rejecting some part, or all of it and, therefore, it is necessary to weigh up this evidence and on so doing one may be satisfied that, if unrebutted, it would warrant the accused's conviction. In such case the accused is then called upon to answer the *prima facie* case which has thus been made out against him. If, however, on the other hand, after weighing up such evidence for the prosecution one is satisfied that it would be wholly unsafe to convict upon such evidence standing alone, then no *prima facie* case has been made out and the accused should not be called on for his defence."

In 1980, the principle contained in the above passage was applied by Hashim Yeop A. Sani J. (as he then was) in *Zahari bin Yeop Baai & Anor.* v. *Public Prosecutor*[10]. In the circumstances, we do not find anything wrong in the trial judge's approach, when calling for the appellant to enter on his defence. He was clearly correct in being satisfied that the prosecution had made out a *prima facie* case for the appellant to answer according to the principle laid down in *Haw Tua Tau* and explained in *Ragunathan.*

In considering the question of law whether there is some evidence (not inherently incredible) to prove one or more of the essential ingredients of the alleged offence, a judge or magistrate must by necessity, evaluate and weigh all the evidence. If there is no evidence at all to prove one or more of the essential ingredients of the offence, the accused must be acquitted without calling for his defence. The requirement of section 180 or section 173(f) C.P.C. cannot be properly complied with unless the judge or magistrate considers and evaluates all the evidence adduced by the prosecution as tested in cross-examination. There is nothing in *Haw Tua Tau* to suggest that for the purpose of proving the essential ingredients of the alleged offence, the words "if unrebutted" in section 180 mean that even if the evidence on primary facts adduced by the prosecution are inherently incredible or the witnesses are found to be untruthful or unreliable, the court must presume that they are respectively true and truthful and must in all cases call for the defence. There must be some credible evidence to prove the essential ingredients of the charge, which in all cases must necessarily include the identity of the accused (see *Yau Heng Fang* v. *Public prosecutor*[11]). Cases involving the acquittal of the accused without defence being called on ground of identity, such as found in *Public Prosecutor* v. *Lim Teong Seng & Ors.*[12], could easily have been justified on the failure of the prosecution to prove an essential ingredient of the charge without the necessity of ignoring or circumventing the statutory burden imposed by sections 173(f), 180 and 190. In the present appeal, the learned trial judge did not therefore err in dealing with the credibility of the witnesses at the close of the prosecution case. In our opinion, if he had dealt with the accuracy of the testimony, he merely erred in favour of the appellant in placing too high a burden on the prosecution before calling for the defence. Further, the fact that the learned trial judge had considered extensively in his judgment the evidence adduced by the defence, shows that he did actually keep an open mind on questions of fact as to the actual guilt of the appellant until the close of defence case. In the result we also find no merit on this last ground of appeal.

For the reasons discussed, we find no real substance in this appeal to merit our interference. The appeal against conviction is dismissed and the sentence is affirmed.

Appeal dismissed.

Solicitors: *Bachan & Kartar.*

WEE HUI HOO v. PUBLIC PROSECUTOR

[A.Cr.J. (Chong Siew Fah J.) September 20, 1985]

[Sibu – Criminal Appeal No. 21 of 1984]

Road Traffic – Driving recklessly or in a manner dangerous to the public – Two distinct offences – Charge bad for duplicity – Whether there was a failure of justice – Road Traffic Ordinance 1960 (Sarawak) (repealed), ss. 28(1) & 29(1) – Road Traffic Ordinance 1958 (Federal), s. 34A.

Criminal Law and Procedure – Charge bad for duplicity – Effect of.

The accused was convicted of an offence under section 29(1) of the Road Traffic Ordinance 1960 and sentenced to a fine of $500. His driving licence for all classes except for Class One was cancelled for one year and he was disqualified from applying for a new driving licence for two years. The charge read as follows:

"That you, on the 14th day of June, 1980, at about 8.00 a.m. at Oya Road, Mukah (near the Three Rivers Secondary

School) being the driver of a vehicle, to wit, a JKR truck bearing plate number SG 5030, did drive the said truck recklessly *or* in a manner which was dangerous to the public having regard to all the circumstances of the case including the nature, condition and use of the road and as a result of such driving conduct, caused the death of a pedestrian Zaiton binti Boll (f) and you thereby committed an offence punishable under section 29(1) of the Road Traffic Ordinance, 1960." (Emphasis added).

The accused appealed against his conviction on several grounds. The main contention dealt with by the court was whether the charge was bad for duplicity so that there was a failure of justice.

Held, allowing the appeal: (1) section 29(1) of the 1960 Ordinance refers to the conduct of driving described in section 28(1). The alternative provisions of section 28(1) create separate and distinct offences and a summons or charge alleging several offences in the alternative is bad for duplicity. In this case the alternative offences charged were based on one and same transaction;

(2) even if the duplicity was one of form and irregularity curable under section 422 of the Criminal Procedure Code, a failure of justice had been occasioned. The appellant had been prejudiced and embarrassed by the duplicity of the charge in his defence;

(3) the conviction was quashed and disqualifications were set aside. The appellant should be retried before another magistrate.

Cases referred to:

(1) *Yap Liow Swee* v. *Public Prosecutor* [1937] M.L.J. 225.
(2) *Muthan* v. *Public Prosecutor* [1947] M.L.J. 86.
(3) *R.* v. *Wilmot* [1933] All E.R. Rep. 628.
(4) *The King* v. *Surrey Justices ex parte Witherick* [1932] 1 K.B. 450.

CRIMINAL APPEAL.

Stephen Chung for the appellant.

Abdul Rahman bin Sebeli (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Chong Siew Fai J.: The appellant was convicted in the Magistrates' Court at Mukah of an offence under section 29(1) of the Road Traffic Ordinance 1960 and sentenced to a fine of $500/-. His driving licence for all classes except for Class One was cancelled for one year and he was disqualified from applying for a new driving licence for two years.

At the trial the appellant was not represented. The record shows that although initially he had engaged counsel, the latter for some personal reason was not able to appear and the learned trial Magistrate, in my opinion, quite rightly refused postponement and proceeded with the trial.

The charge to which the appellant had to plead and on which he was convicted was framed in the following terms:

> "That you, on the 14th day of June, 1980, at about 8.00 a.m. at Oya Road, Mukah (near the Three Rivers Secondary School) being the driver of a vehicle, to wit, a JKR truck bearing plate number SG 5030, did drive the said truck recklessly *or* in a manner which was dangerous to the public having regard to all the circumstances of the case including the nature, condition and use of the road and as a result of such driving conduct, caused the death of a pedestrian Zaiton binti Boll (f) and you thereby committed an offence punishable under section 29(1) of the Road Traffic Ordinance, 1960." (Emphasis added).

The appellant appealed against his conviction on several grounds. I need only deal with those pertaining to the contentions that the charge was bad for duplicity, that the appellant had been prejudiced and embarrassed and that a failure of justice had occasioned.

The Road Traffic Ordinance 1960 (Sarawak) has been repealed and replaced by the Road Traffic Ordinance 1958 (Federal) as from April 12, 1984. Section 29(1) of the 1960 Ordinance refers to the conduct of driving described in section 28(1) thereof which is materially similar to section 34A of the Federal 1958 Ordinance and also to section 1(1) of the Road Traffic Act 1960 in England.

Section 28(1) of the 1960 Ordinance under which the appellant was charged provides: "Any person who drives a motor vehicle . . . . . recklessly, or at a speed or in a manner which is dangerous to the public ..." The alternative provisions create separate and distinct offences and a summons or charge alleging several offences *in the alternative* is bad for duplicity. *Yap Liow Swee* v. *Public Prosecutor*[1] *Muthan* v. *Public Prosecutor*[2] *R.* v. *Wilmot*[3]. In the instant case under appeal, it is, of course, clear that the alternative offences charged were based on one and same transaction.

The learned Deputy Public Prosecutor conceded that the charge was bad for duplicity and that, from the judgment, the defective charge appeared to have caused some confusion in the mind of the learned trial Magistrate. However, he submitted that there had been no miscarriage of justice and that the defect was curable.

The situation in the instant case under appeal

is almost similar to that in *Yap Liow Swee* v. *Public Prosecutor*[1]. There the accused was convicted on a charge of driving a bus "recklessly or negligently in a manner which was dangerous to the public". On appeal, it was held tht the conviction was bad for duplicity which amounted to illegality that could not be cured under section 422 of the Criminal Procedure Code. Though unlike section 45(i) of the Motor Vehicles Enactment of which *Yap Liow Swee's* case *(supra)* was concerned, the offence of "negligent driving" was not made an offence under section 28(1) of the 1960 Ordinance, the principle enunciated there nevertheless applies. On the issue of whether the duplicity in the charge was a mere irregularity which could be cured, or an illegality, Terrell Ag. C.J. (S.S.) said (at 226):

"But in a case like the present the prosecution do not set out to prove both recklessness and negligence, but merely one or the other. Accordingly the accused is embarrassed in his plea and if he is convicted he is left in doubt as to the offence of which he has been convicted.

I have no doubt therefore that duplicity of this kind is an illegality, ..."

Cussen J. said (at 227):

"Finally I do not consider that this is an irregularity curable under section 422 of the Code ....

It is a contravention of an express provision of the Code, *i.e.* section 163; it is a matter of substance and not of form; it creates uncertainty and embarrassment; it is a charge to which it is impossible to make a simple plea; it is an illegality."

In *The King* v. *Surrey Justices ex parte Witherick*[4] the appellant was convicted on an information which charged him with driving "without due care and attention or without reasonable consideration for other persons using the road." It was held that the conviction was bad for duplicity, the appellant having been charged with those two offences in the alternative. In his judgment Avory J. said (page 452):

"It is an elementary principle that an information must not charge offences in the alternative, since the defendant cannot then know with precision with what he is charged and of what he is convicted and may be prevented on a future occasion from pleading autrefois convict."

In *R.* v. *Wilmot*[3] the appellant was convicted on a count that he "drove a motor car recklessly, or at a speed or in a manner which was dangerous to the public . . . . ." It was held on appeal, applying *The King* v. *Surrey Justices ex parte Witherick*,[4] *supra*, that the count was bad for duplicity and that the conviction must be quashed.

But even if the duplicity is one of form and an irregularity curable under section 422 of the Criminal Procedure Code as contended by the learned Deputy Public Prosecutor, I am of the opinion that a failure of justice had occasioned. The appellant, who incidentally was unrepresented at the trial, had been prejudiced and embarrassed by the duplicity of the charge in his defence. Furthermore, he was found guilty and convicted not on one of the two alternative offences but rather on the defective charge as framed. This is clear from the judgment of the learned trial Magistrate at page 4 in which he said: "I find him guilty of the offence *as charged* and enter a conviction against him on the same." (Emphasis added).

For the above reasons, this appeal is allowed. The conviction is quashed and the sentence and disqualifications are set aside. I order the appellant to be retried before another magistrate.

In the light of the order made, I do not propose to deal with the other grounds of appeal.

Conviction quashed and sentence set aside. Retrial ordered.

SATVINDER SINGH v. PUBLIC PROSECUTOR

[A.C.J. (Mustapha Hussain J.) May 29, 1986]

[Seremban – Criminal Application No. 2 of 1986]

Criminal Law and Procedure – Detention order – Application for – Powers of the Registrar of Sessions Court and Magistrate co-extensive – Order of Magistrate quashing order of Registrar was null and void – Criminal Procedure Code (F.M.S. Cap. 6), s. 117.

Jurisdiction – Powers of Magistrate and Registrar co-extensive – Order of Magistrate quashing order of Registrar null and void.

On April 23, 1986, the applicant was taken before the Registrar of the Sessions Court, Seremban, by an Anti-Corruption Agency officer who applied for a detention order against the applicant under section 117 of the Criminal Procedure Code. At the hearing of the application, the applicant was represented by his counsel. After submissions by the counsel the Registrar made an order for the applicant to go to the Anti-Corruption Agency Office to give a statement and be released thereafter. However, the applicant was later brought before a Magistrate at Seremban and an application was made for an order of one week's detention under section 117 of the Criminal Procedure Code. The learned Magistrate made an order of four days' detention of the applicant. The applicant then through his counsel filed an urgent application before the present court seeking